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No. 96-651

In The
Supreme Court Of The United States

OCTOBER TERM, 1996

JAMES E. GILBERT, President, East Stroudsburg University, *et al.*,

Petitioners,

v.

RICHARD J. HOMAR,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Respondent Richard J. Homar's arguments for affirmance of the judgement in this case of the United States Court of Appeals for the Third Circuit which reversed the trial court's granting of summary judgement to the Petitioners. The Court of Appeals found that the Fourteenth Amendment to the United States Constitution requires that both notice and an opportunity to be heard are to be given to a tenured public employee (in this case, a police officer) who is accused, but not proven guilty of, wrongdoing, prior to the termination or suspension without pay of that employee.

NAPO is a nationwide non-profit association of professional, labor and trade organizations, headquartered in Washington, D.C., which represents state, local and federal law enforcement officers. Through its 3,500 state and local affiliates, NAPO actively represents approximately 190,000 sworn, rank-and-file law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation, prosecution, both civil and criminal, and punishment, of police.

NAPO has an important interest in this case, as the case presents issues the resolution of which will define the extent to which law enforcement officers throughout the United States

are entitled to the basic constitutional protections of governmental notice and opportunity to be heard prior to the governmental deprivation of the citizen-officer's property. These rights, unfortunately, have been and are in increasing danger of erosion due to prosecutorial and administrative reaction to perceived public "outrage" towards police. Internal police department investigation into the conduct of individual officers is routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Officers' rights are in grave danger of being sacrificed upon the altar of political expediency. A clear enunciation of the rights enjoyed by individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of Petitioners James E. Gilbert, *et al.*, and of Respondent Richard J. Homar, to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

Petitioners, in their brief to this Court, argue that "little useful purpose would [be] served" by providing a law enforcement officer who has been accused of misconduct an opportunity to explain himself prior to the loss of his job. Petitioners' Brief at p. 20. Petitioners also characterize such a hearing as "pointless" and assert that the suspension from employment of a police officer who has been accused of criminal misconduct is "a paid vacation". *Ibid* at p. 22.

Amicus curiae suggests that, within the context of judicial analysis of the burden placed upon state or local government by having to comply with constitutional obligations of notice and opportunity to be heard prior to the termination or suspension without pay of a tenured public employee, this Court should note the already extant framework within which police officers are investigated and disciplined. *Amicus curiae* asserts that the existing framework is so wide-spread, so familiar, so effective, and so well grounded in the most fundamental of Anglo-American concepts of due process that it constitutes persuasive grounds upon which to hold that state and local governments are not, in fact and in actual practice, unduly burdened by having to provide notice and an opportunity to be heard, prior to termination or suspension without pay, in each and every case where a tenured law enforcement officer is accused of wrongdoing

ARGUMENT

THE EXISTING CONSTITUTIONAL FRAMEWORK WITHIN WHICH POLICE OFFICERS ARE INVESTIGATED AND DISCIPLINED IS SUFFICIENTLY SWIFT, FAMILIAR, AND EFFECTIVE SO AS TO RENDER UNNECESSARY THE IMMEDIATE SUSPENSION WITHOUT HEARING AND WITHOUT PAY OF ANY OFFICER ACCUSED OF WRONGDOING.

Individual law enforcement officers execute their official duties under the greatest scrutiny. Their actions, both public and private, are continuously monitored and investigated by their own departments, civilian and professional review boards, state and local regulatory commissions, the print and electronic media, and state, local and federal investigators and prosecutors. This scrutiny has intensified within the last few years as isolated cases involving controversial police actions, including the case at bar, are cited as proof by some that all police cannot be trusted, that all police are brutal, or that all police are racist. Neither this Court nor the people of this nation would stand for such painting with a broad brush of other identifiable groups of individuals. Yet it has become sadly fashionable to negatively stereotype law enforcement officers in a way that would be intolerable if applied to African-Americans, women, Jews, Catholics, homosexuals, persons with disabilities or the elderly. State and federal prosecutors and administrators, not immune from the political pressures of the times, are at least tempted to afford individual law enforcement officers accused of wrongdoing a little less due process than another person similarly situated might

receive.

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). *Garrity* and its progeny have yielded a familiar and workable legal framework, well-grounded in the Constitution, for the securing by internal and administrative investigators of evidence concerning officers who have been accused of misconduct. *See, e.g., United States v. Camacho*, 739 F.Supp. 1504, 1512-15 (S.D.Fla. 1990) (outlining settled constitutional standards of internal police investigations). These effective and constitutional procedures were ignored in the investigative stages of the case at bar, however, despite the fact that the honoring of Officer Homar's rights as a citizen would have proved no obstacle to the *lawful* investigation and prosecution of his alleged criminal misconduct.

Under the *Garrity* process, individual officers may be compelled to testify regarding allegations of misconduct, on pain of losing their jobs should they refuse, consistent with the Constitution because those statements are immunized from use, "directly and indirectly", against the officer in any subsequent criminal proceeding. *Garrity*, 385 U.S. at 500. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Internal affairs

investigators, prosecutors, defense attorneys, union representatives and individual officers are familiar with and understand the practical as well as constitutional dimensions of being called in and compelled to testify about allegations of police misconduct. *See*, Warnken, *The Law Enforcement Officer's Privilege Against Compelled Self-Incrimination*, 16 U.Balt.L.Rev. 452, 492-515 (1987) (survey of various state statutes codifying constitutional procedures mandated by *Garrity*); *Rights of Police Officers During Internal Investigations: Hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102nd Cong., 2nd Sess., *passim* (1992) (testimony of witnesses reflecting status of police internal investigative procedure across country). The fact that the individual officer's testimony may not be used against him or her in a subsequent criminal prosecution does not prohibit the police department from appropriately disciplining the officer, including suspending the officer without pay, demoting him or her, or terminating him or her from employment. Nor does the fact that the particular statement and its fruit are prohibited to be used against the officer in a subsequent criminal proceeding prevent the investigation, arrest, charging, prosecution, conviction and punishment of the officer, through independent, non-compelled self-incriminating testimony or any other *lawful* means.

Investigators, administrators, and attorneys who are charged with the duty to oversee police have in particular become practiced and adept at monitoring and evaluating the process of investigating officers accused of wrongdoing. Where, as in this case, the accusation involves an allegation of criminal misconduct, the obligation upon administrators is

generally no more burdensome than isolating Fifth Amendment violation-tainted evidence from trial prosecutors as well as other investigators who are continuing to actively work the case. *See*, Unreported Order of the District Court Granting Request for *Kastigar* Hearing, reprinted as Appendix E of the *Petition for Writ of Certiorari* in *Koon v. United States*, United States Supreme Court Case No. 94-1664 at pages 151a-153a. Most significantly, local, state and federal prosecutors and administrators have proved able in fact to secure convictions against officers guilty of criminal misconduct by *lawfully* and *constitutionally* prosecuting those officers. Additionally, just as police have found that honoring suspects' constitutional rights has not frustrated their ability to secure arrests and convictions, so administrators and police managers have learned that tenured employees, including accused police officers, can be quickly and sustainably suspended without pay or terminated using *constitutional* means as a *practical* matter.

It being well-settled that the Constitution's protections may be properly demanded *by* individual police officers as legitimately as those protections may be demanded *of* police officers, officers, departments, investigators, courts and prosecutors have come to rely upon the settled law in this area to guide them in the administration of internal and administrative matters to a degree not found in any other profession. Seen in this context, the Petitioners' proposed circumscription of the extent of the protection of the Fourteenth Amendment's Due Process Clause is a matter of profound concern to law enforcement. At the individual level, officers would, under the Petitioners' view of the Due Process Clause, reside under an interpretation of the Constitution that expressly refuses to recognize fundamental due process protections to the

same extent as recognized by various federal circuits and state courts of last resort.

At the organizational level, well-established, workable and effective means of addressing allegations of misconduct while honoring individual officers' fundamental rights are in substantial danger of being thrown into chaos because of the uncertainty injected into the system by the Petitioners' views.

At the professional level, attorneys, police administrators, union representatives and shop stewards would stand unsure of the status of the law and uncertain how best to advise officers and other clients regarding these most fundamental of rights. While some uncertainty may be inherent in advising clients of their rights under the law, this Court ought to seize the opportunity to clarify those rights when possible, as here. A simple and definitive declaration by this Court that constitutional due process does, in fact, always mean governmental provision of notice and an opportunity to be heard *prior to* the deprivation by the government of *any* citizen's lawful property, it is respectfully suggested, is what is called for in the circumstances of this case.

This opportunity is all the more imperative when such a clarification would serve to vindicate the rights of persons who, despite being viewed as presently unpopular, or, rather, because of that very fact, are especially in need of our Constitution's protections.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations, Inc. respectfully requests that the Court affirm the judgement in this case of the United States Court of Appeals for the Third Circuit, and remand this cause to the trial court for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted this 7th day of March, 1997,

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